

HOUSE BILL NO. 676

INTRODUCED BY E. ARNTZEN

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30

A BILL FOR AN ACT ENTITLED: "AN ACT CLARIFYING THAT THE MONTANA IMPLIED CONSENT STATUTES DO NOT APPLY TO A BLOOD OR BREATH TEST TAKEN AS A LAWFUL SEIZURE AND USED AS EVIDENCE FOR AN OFFENSE OTHER THAN THOSE IN TITLE 61, CHAPTER 8, PART 4, MCA; AMENDING SECTION 61-8-402, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE."

WHEREAS, section 61-8-402, MCA, provides that a blood test may not be taken without the approval of the individual subject to the test when the blood sample is to be used for the purposes of proving a violation of Montana law prohibiting driving while under the influence of alcohol or drugs (DUI); and

WHEREAS, the Montana Supreme Court, in State v. Thompson, 207 Mont. 433, 674 P.2d 1094 (1984), held that the proscription in section 61-8-402, MCA, against nonconsensual blood samples does not apply in cases in which the blood sample is sought to prove an offense other than DUI; and

WHEREAS, the Montana Supreme Court, in Collins v. State, 232 Mont. 73, 755 P.2d 1373 (1988), held that a blood sample sought to prove a violation of a probation order may lawfully be taken pursuant to a properly executed search warrant; and

WHEREAS, section 61-8-402, MCA, now recognizes exceptions to the implied consent law that involve evidence of offenses other than DUI but does so in a way that is unclear and does not specifically recognize samples take pursuant to a search warrant.

THEREFORE, the purpose of the Montana Legislature in amending section 61-8-402, MCA, is to clarify the implied consent law and to clearly state that the implied consent law may not be used as a shield to prevent the constitutionally sanctioned taking of blood samples for use in a blood-alcohol test to be used as evidence in the prosecution of offenses other than DUI offenses, which the Legislature believes is not a change in the law but a clarification of the law.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 61-8-402, MCA, is amended to read:



1 **"61-8-402. Blood or breath tests for alcohol, drugs, or both.** (1) A person who operates or is in actual
2 physical control of a vehicle upon ways of this state open to the public is considered to have given consent to a
3 test or tests of the person's blood or breath for the purpose of determining any measured amount or detected
4 presence of alcohol or drugs in the person's body.

5 (2) (a) The test or tests must be administered at the direction of a peace officer when:

6 (i) the officer has reasonable grounds to believe that the person has been driving or has been in actual
7 physical control of a vehicle upon ways of this state open to the public while under the influence of alcohol, drugs,
8 or a combination of the two and the person has been placed under arrest for a violation of 61-8-401;

9 (ii) the person is under the age of 21 and has been placed under arrest for a violation of 61-8-410; or

10 (iii) the officer has probable cause to believe that the person was driving or in actual physical control of
11 a vehicle:

12 (A) in violation of 61-8-401 and the person has been involved in a motor vehicle accident or collision
13 resulting in property damage; or

14 (B) involved in a motor vehicle accident or collision resulting in serious bodily injury, as defined in
15 45-2-101, or death.

16 (b) The arresting or investigating officer may designate which test or tests are administered.

17 (3) A person who is unconscious or who is otherwise in a condition rendering the person incapable of
18 refusal is considered not to have withdrawn the consent provided by subsection (1).

19 (4) If an arrested person refuses to submit to one or more tests requested and designated by the officer
20 as provided in subsection (2), the refused test or tests may not be given, but the officer shall, on behalf of the
21 department, immediately seize the person's driver's license. The peace officer shall immediately forward the
22 license to the department, along with a report certified under penalty of law stating which of the conditions set
23 forth in subsection (2)(a) provides the basis for the testing request and confirming that the person refused to
24 submit to one or more tests requested and designated by the peace officer. Upon receipt of the report, the
25 department shall suspend the license for the period provided in subsection (6).

26 (5) Upon seizure of a driver's license, the peace officer shall issue, on behalf of the department, a
27 temporary driving permit, which is effective 12 hours after issuance and is valid for 5 days following the date of
28 issuance, and shall provide the driver with written notice of the license suspension and the right to a hearing
29 provided in 61-8-403.

30 (6) (a) Except as provided in subsection (6)(b), the following suspension periods are applicable upon

1 refusal to submit to one or more tests:

2 (i) upon a first refusal, a suspension of 6 months with no provision for a restricted probationary license;

3 (ii) upon a second or subsequent refusal within 5 years of a previous refusal, as determined from the

4 records of the department, a suspension of 1 year with no provision for a restricted probationary license.

5 (b) If a person who refuses to submit to one or more tests under this section is the holder of a
6 commercial driver's license, in addition to any action taken against the driver's noncommercial driving privileges,
7 the department shall:

8 (i) upon a first refusal, suspend the person's commercial driver's license for a 1-year period; and

9 (ii) upon a second or subsequent refusal, suspend the person's commercial driver's license for life,
10 subject to department rules adopted to implement federal rules allowing for license reinstatement, if the person
11 is otherwise eligible, upon completion of a minimum suspension period of 10 years. If the person has a prior
12 conviction of a major offense listed in 61-8-802(2) arising from a separate incident, the conviction has the same
13 effect as a previous testing refusal for purposes of this subsection (6)(b).

14 (7) A nonresident driver's license seized under this section must be sent by the department to the
15 licensing authority of the nonresident's home state with a report of the nonresident's refusal to submit to one or
16 more tests.

17 (8) The department may recognize the seizure of a license of a tribal member by a peace officer acting
18 under the authority of a tribal government or an order issued by a tribal court suspending, revoking, or reinstating
19 a license or adjudicating a license seizure if the actions are conducted pursuant to tribal law or regulation
20 requiring alcohol or drug testing of motor vehicle operators and the conduct giving rise to the actions occurred
21 within the exterior boundaries of a federally recognized Indian reservation in this state. Action by the department
22 under this subsection is not reviewable under 61-8-403.

23 (9) A suspension under this section is subject to review as provided in this part.

24 (10) This section does not apply to blood and breath tests, samples, and analyses used for purposes of
25 medical treatment or care of an injured motorist or ~~related to~~ when taken as a lawful seizure, including pursuant
26 to a search warrant, for a suspected violation of an offense not in this part ~~evidence related to an offense other~~
27 than those specified in this part."

28

29 **NEW SECTION. Section 2. Effective date.** [This act] is effective on passage and approval.

30

